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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

CISCO SYSTEMS, INC.,

Plaintiff,

vs.

ARISTA NETWORKS, INC.,

Defendant.

CASE NO. 5:14-cv-5344-BLF

**CISCO'S RESPONSE TO ARISTA'S
SUPPLEMENTAL PROPOSED
DISCOVERY PLAN**

**REDACTED VERSION OF DOCUMENT
SOUGHT TO BE SEALED**

Dept.: Courtroom 3

1 **I. INTRODUCTION**

2 The Supplemental Proposed Discovery Plan (“Plan”) submitted by Defendant Arista
 3 Networks, Inc. (“Arista”) fails to explain why it would be necessary to double—for the second
 4 time—the number of permissible depositions in this case. *See* Dkt. 180, 181. Although Arista
 5 asserts that the forty depositions it seeks leave to take are “relevant,” Arista does not explain why
 6 those depositions are necessary. Both parties could take dozens of arguably “relevant”
 7 depositions. But increasing the number of depositions to four times the default limit of Fed. R.
 8 Civ. P. 30 is neither substantively necessary nor practical as a matter of case management.
 9 Plaintiff Cisco Systems, Inc. (“Cisco”) therefore respectfully requests that Arista’s Plan be
 10 rejected.

11 Discovery is not justified just because it may be “relevant”—especially not discovery in
 12 excess of the default limits provided in the Federal Rules of Civil Procedure. Rather, discovery is
 13 permissible only where it *both* seeks relevant information and is “proportional to the needs of the
 14 case.” Fed. R. Civ. P. 26(b)(1). The recent amendments to Rule 26 of the Federal Rules of Civil
 15 Procedure reinforce the importance of the proportionality requirement. *See, e.g.*, Fed. R. Civ. P.
 16 26 Advisory Committee’s note (2015) (“The present amendment restores the proportionality
 17 factors to their original place in defining the scope of discovery.”).

18 In its Plan, however, Arista offers little more than tenuous arguments about the relevance
 19 of the depositions it proposes taking. Arista does not explain the need for its proposed increase in
 20 permissible depositions and completely ignores the redundant and cumulative nature of the
 21 discovery it seeks. Arista’s Plan—replete with unnecessary, duplicative depositions aimed at
 22 testimony that, even if obtained, would be largely irrelevant and inadmissible in the case in any
 23 event—should be rejected.

24 **II. ARISTA HAS NOT SHOWN GOOD CAUSE FOR AN ADDITIONAL TWENTY**
 25 **DEPOSITIONS.**

26 **A. Arista Has Not Shown Good Cause To Depose 19 CLI Creators.**

27 Nearly half of the deponents in Arista’s Plan are individuals who created Cisco CLI
 28 command expressions. This includes five depositions that have already occurred (Messrs. Li,

1 Lougheed, Roy, and Slattery, and Ms. Liu), four depositions that Arista has noticed (Messrs.
 2 Kavasseri, Marques, Patil, and Satz), and ten depositions Arista intends to notice (nine unspecified
 3 CLI “authors” from a list of eighteen and Mr. Remaker). Arista does not have good cause to take
 4 cumulative depositions of nineteen witnesses on the same subjects, especially where the
 5 depositions taken so far show that the testimony Arista seeks is cumulative and of marginal
 6 relevance at best.

7 Contrary to Arista’s representations, the depositions taken to date universally confirm that
 8 Cisco’s copyrighted command-line interface (“CLI”) is the product of a creative process at Cisco
 9 spanning three decades. For example, Kirk Lougheed—a Cisco founder and creator of the earliest
 10 version of Cisco’s CLI—testified about his creation of the configuration command “ip address.”
 11 Although Arista has implied that this command expression is not a creative, protectable element of
 12 Cisco’s copyrighted works, Mr. Lougheed testified that he chose to use the expression “ip
 13 address” instead of a variety of alternatives, including expressions employing different terms
 14 and/or terms that were arranged differently. *See* Ex. 1 (Lougheed Dep. Tr.) at 129:10-130:20,
 15 131:23-132:9. Other CLI creators—whether employed by Cisco or third parties—have repeatedly
 16 testified that CLI command expressions are creative choices. *See, e.g.,* Ex. 2 (Li Dep. Tr.) at
 17 172:1-173:15; Ex. 3 (Roy Dep. Tr.) at 33:18-40:8; Ex. 4 (Liu Dep. Tr.) at 181:14-184:18. [REDACTED]

18 [REDACTED]
 19 [REDACTED] *See* Ex. 5 (Dale Dep. Tr.) at 150:21-154:10, 188:2-25; Ex. 6 (Sweeney Dep. Tr.) at
 20 115:15-23, 175:15-177:24, 223:17-224:12. In fact, one of Arista’s lead software engineers stated
 21 in an email he sent while working on certain of Cisco’s copyrighted CLI command expressions
 22 before moving to Arista, that the choice of terms in a command expression is “very subjective,”
 23 requiring Cisco engineers to exercise their best judgment regarding command syntax. *See* Ex. 8
 24 (Sweeney Dep. Ex. 123). “These expressive choices push [Cisco’s CLI] into the realm of
 25 copyrightability.” *See Enterprise Mgmt. Ltd. v. Warrick*, 717 F.3d 1112, 1119 (10th Cir. 2013)
 26 (reversing summary judgment in favor of copyright infringement defendant, applying *Feist*
 27 *Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991)). In any event, Arista now has
 28 ample information about how Cisco’s CLI command expressions were created.

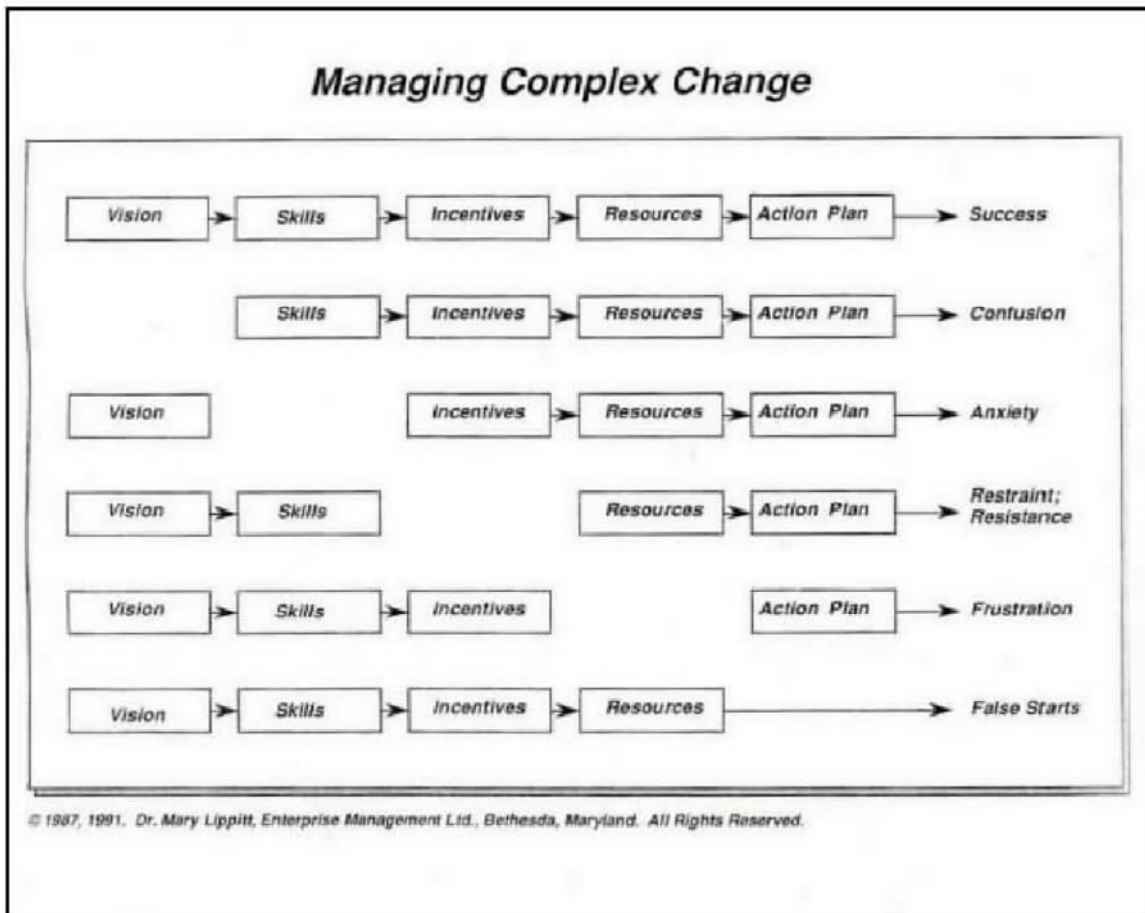
1 Arista's request for nineteen depositions regarding fine-grained details about how Cisco's
 2 creative process played out with respect to every single element of Cisco's copyrighted works is
 3 not proportionate to the issues in the case. Originality is a low bar. *See Feist Pub'ns, Inc. v. Rural*
 4 *Telephone Service Co.*, 499 U.S. 340, 345 (1991) ("To be sure, the requisite level of creativity is
 5 extremely low; even a slight amount will suffice."). Evidence explaining the process by which a
 6 copyrighted work is created, even if not focused on the details of each element in a work, is
 7 sufficient to prove originality. *See CDN Inc. v. Kapes*, 197 F.3d 1256, 1260-61 (9th Cir. 1999)
 8 (holding that the process by which publisher of guide to value of collectible coins arrived at values
 9 was sufficiently creative for the guide, and the values it contained, to be protectable). Arista does
 10 not need—and cannot show good cause—for cumulative depositions of fourteen more witnesses,
 11 over and above the five that have already been deposed on this comparatively unimportant subject.

12 Arista contends that these witnesses are necessary because they have testified or will
 13 testify that the "words" or "terms" that comprise Cisco's copyrighted CLI command expressions
 14 are similar to words or commands used in third-party systems and/or industry standards
 15 documents. *See* Plan at 2-3 (discussing Li, Liu, Loughheed, and Roy), *id.* at 4 (discussing
 16 Kavasseri, Marques, Patil, and Satz); *see also id.* at 5 (asserting that "commands stem from
 17 industry standards, common usage, or software systems that pre-date Cisco's founding"). But that
 18 is both unnecessary and irrelevant. First, there is no reason why Arista needs a live witness to
 19 confirm that the same or similar words appear in some of Cisco's CLI command expressions and
 20 in other documents. If true, that will be evident from the face of the documents themselves.

21 Second, as a matter of law, the fact that some of the words or terms contained in Cisco's
 22 CLI command expressions have been used in other documents has nothing whatsoever to do with
 23 the originality of Cisco's works. "Originality does not signify novelty; a work may be original
 24 even though it closely resembles other works so long as the similarity is fortuitous, not the result
 25 of copying." *Feist*, 499 U.S. at 345. As the Tenth Circuit has noted:

26 [Defendant's] view misses the forest for the trees. Any copyrightable work can be
 27 sliced into elements unworthy of copyright protection. Books could be reduced to
 28 a collection of non-copyrightable words. Music could be distilled into a series of
 non-copyrightable rhythmic tones. A painting could be viewed as a composition of
 unprotectable colors.

1 *Enterprise Mgmt.*, 717 F.3d at 1119 (citation omitted). In that case, the Tenth Circuit reversed the
 2 trial court's grant of summary judgment to Warrick, the defendant, who had argued that a single
 3 presentation slide containing an arrangement of common words (reproduced below) was
 4 sufficiently creative to be copyrightable. *Id.* at 1119. Cisco's arrangement of terms into CLI
 5 command expressions, as well as the hierarchical arrangement of those command expressions,
 6 comprises a similarly creative work worthy of copyright protection, regardless of whether those
 7 terms were known before the creation of Cisco's CLI.



23 While Arista is free to devote as many of its twenty depositions to individual CLI creators
 24 as it wishes, Arista's decision to devote more than five of its twenty depositions to cumulative and
 25 largely irrelevant testimony on a minor issue at the expense of depositions on far more significant
 26 issues should not be rewarded with additional depositions.

B. Arista Has Not Shown Good Cause To Depose Nine “Competitors.”

The second largest category of deponents identified in Arista’s Plan comprises third-party network device companies (Avaya, Brocade, Dell, Juniper Networks, Hewlett-Packard, Lenovo, D-Link, Edge-Core, and Extreme). Arista asserts that each of these companies uses a CLI that includes many of the same commands asserted in this case and argues that it needs to depose each of these companies to confirm that they “used the same commands openly because they, and the industry, understood that the commands were not proprietary.” Plan at 4, 6. Arista adds that some of the companies described their CLI as “industry standard.” *Id.* However, even if Arista were correct (and it is not), any such testimony would be irrelevant and inadmissible in this case. Moreover, it is entirely cumulative of documents and other testimony.

As an initial matter, to the extent that Arista is misleadingly suggesting that it somehow needs to depose these competitors to establish that Cisco’s CLI is an “industry standard,” that is incorrect. It is simply untrue that the use of Cisco’s CLI is required by *any* industry standard. “Standards” documents in the networking industry focus on the operation of networks and the devices of which they are comprised. They do not specify command expressions that must be used for implementing those “standards.” [REDACTED]

[REDACTED] See Ex. 2 (Li Dep. Tr.) at 202:23-204:1; Ex. 9 (Foss Dep. Tr.) at 112:11-13; Ex. 5 (Dale Dep. Tr.) at 263:20-273:6; Ex. 6 (Sweeney Dep. Tr.) at 165:1-6; Ex. 7 (Duda Dep. Tr.) at 57:10-59:24, 62:17-63:12, 272:1-4; see also Ex. 4 (Liu Dep. Tr.) at 188:9-206:10 (testifying with respect to specific protocols). As Arista’s CTO testified, [REDACTED]

[REDACTED] Ex. 7 (Duda Dep. Tr.) at 75:5-17. [REDACTED]

See Ex. 5 (Dale Dep. Tr.) at 222:4-224:3. [REDACTED]

1 [REDACTED]
2 [REDACTED] See Ex. 10 (Shafer Dep. (Rough) Tr.) at 96:11-100:4.

3 Arista also cannot show good cause to depose nine competitors simply to establish that
4 those competitors' CLIs include some of the same command expressions. Manuals and other
5 technical documentation, produced pursuant to subpoena from these competitors should suffice to
6 demonstrate what commands those competitors used and/or how they described those commands.
7 In any event, that some of these competitors may use some CLI command expressions similar to
8 some command expressions contained in Cisco's copyrighted works is irrelevant. The behavior of
9 these third parties has no relevance to any claim or defense in this matter and Arista has not
10 articulated any. *Cf. Oracle Am., Inc. v. Google Inc.*, 750 F.3d 1339, 1372 (Fed. Cir. 2014) ("In
11 fact, the Ninth Circuit has rejected the argument that a work that later becomes the industry
12 standard is uncopyrightable."). Whether or not these competitors used Cisco's command
13 expressions and whether or not any such use rose to the level of copyright infringement has
14 nothing to do with Arista's wholesale copying of Cisco's CLI. Indeed, one of Arista's purported
15 bases for seeking this discovery—laches—is not even a cognizable defense to copyright
16 infringement. *See Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1662, 1673-74 (2014).
17 Moreover, even if any use by these competitors was actionable, that is irrelevant to Cisco's claims
18 against Arista. *See id.* at 1676 ("It is hardly incumbent on copyright owners, however, to
19 challenge each and every actionable infringement."). [REDACTED]
20 [REDACTED]

21 [REDACTED] See Ex. 5 (Dale Dep. Tr.) at 222:4-224:30; Ex. 11 (Dale
22 Dep. Ex. 106) at 38; Ex. 12 (Dale Dep. Ex. 109); Ex. 13 (Sweeney Dep. Ex. 121); Ex. 14
23 (Sweeney Dep. Ex. 122); Ex. 15 (Sweeney Dep. Ex. 124) at 2 ("Follow the Industry Standard");
24 Ex. 7 (Duda Dep. Tr.) at 45:2-47:23, 154:22-155:5; Ex. 17 (Duda Dep. Ex. 269).

25 Finally, Arista does not have good cause to depose nine competitors only to elicit
26 testimony regarding their purported subjective belief that "the commands were not proprietary."
27 Even if that were true (and it is not), such testimony would be inadmissible. *See Fed. R. Evid.*
28 701(c). The protectability of Cisco's CLI is a question for the Court. *See, e.g., Media.net*

1 *Advertising FZ-LLC v. NetSeer, Inc.*, --- F. Supp. 3d ----, 2016 WL 141707, at *5 n.3 (N.D. Cal.
 2 Jan. 12, 2016). The subjective assessments of third-party corporations would be improper opinion
 3 testimony. *See* Fed. R. Evid. 701(c). Moreover, any such “understanding” would be woefully
 4 uninformed. Any user of Cisco’s operating system is greeted by a copyright notice when they
 5 start the CLI. And in 2003, Cisco publicly sued Huawei, a competitor, for infringing its
 6 copyrights by, *inter alia*, slavishly copying Cisco’s CLI.¹

7 Arista seeks to depose three of these nine competitors (Avaya, HP, and Juniper Networks)
 8 for the additional reason that they have information relevant to prior art to the asserted patents.
 9 While Arista has not explained how such depositions would provide any information beyond that
 10 contained in the technical documentation describing the prior art, assuming Arista deposes these
 11 three competitors on both the prior art and CLI-related subjects, there would plainly be no need for
 12 Arista to depose an additional six competitors above and beyond those three. Additional
 13 competitor depositions are unwarranted and would be unduly cumulative and a waste of resources.

14 **C. Arista Has Not Shown Good Cause For Many Other Depositions In Its Plan.**

15 Arista’s Plan fails to show good cause for many of the additional depositions requested and
 16 often inexplicably seeks multiple witnesses when one would suffice.

17 Fred Baker. It is unclear what Arista means when it says that Mr. Baker “has written
 18 several industry standard-setting documents that are directly relevant to the asserted commands.”
 19 Plan at 5. The appropriate question is whether Mr. Baker’s deposition testimony would be
 20 relevant and necessary to an issue in the case. Arista has identified no such issue. As described
 21 above, the use of Cisco’s CLI is not required by any industry standard and the use of the same or
 22 similar words or terms in both the asserted commands and any industry standard document is
 23 irrelevant to any issue in dispute.

24
 25
 26
 27 ¹ Notably, these facts also show that Arista’s proposed antitrust counterclaims based on an
 28 alleged “about-face” by Cisco are untenable. Cisco has never taken the position that its
 competitors are free to use the proprietary CLI that Cisco spent three decades developing.

1 Prakash Bettadapur. Arista says of Mr. Bettadapur only that he “is one of the named
 2 inventors of the ‘886 patent.” *Id.* at 6. But Arista has already deposed Mr. Tjong, the other ‘886
 3 patent inventor, and received documents and interrogatory responses regarding the conception and
 4 reduction to practice of the ‘886 patent. *Id.* at 3. Arista does not identify any non-duplicative
 5 testimony that it seeks from Mr. Bettadapur. In any event, if Arista wishes to depose Mr.
 6 Bettadapur, it should prioritize his deposition among the other depositions in the matter.

7 Competitive Personnel. Arista says vaguely that it plans to select “2-3 competitive
 8 personnel” to depose. *Id.* at 6. But Arista does not explain why it needs more than one individual
 9 deposition on that subject, over and above already duplicative 30(b)(6) testimony on the same
 10 subjects. *See* Ex. 16 (Arista’s 30(b)(6) Notice) at Topic Nos. 112, 114. Arista’s antitrust claims
 11 are not part of this matter; thus, Arista has no need for multiple redundant competition depositions
 12 at this time.

13 Sales & Marketing Personnel. Arista claims that it will need to depose “1-2 sales and
 14 marketing personnel.” Plan at 6. As with competitive personnel, Arista does not explain why it
 15 needs more than one such deposition in addition to already duplicative Rule 30(b)(6) testimony
 16 regarding sales and marketing topics. *See* Ex. 16 (Arista’s 30(b)(6) Notice) at Topic Nos. 106-
 17 107, 114-116. Arista’s antitrust claims are not part of this matter; thus, Arista has no need for
 18 multiple redundant marketing depositions at this time.

19 Tail-f & Network Compliance Manager Personnel. Arista claims that it needs to depose
 20 two witnesses to explain the operation of Tail-f and Network Compliance Manager, two Cisco
 21 products that are capable of interacting with third-party network devices. Plan at 6-7. As an
 22 initial matter, Arista mischaracterizes the operation of these products, claiming that they allow
 23 “customers to use Cisco CLI commands to configure other vendors’ switches by translating Cisco
 24 CLI commands to competitors’ CLI commands.” *Id.* at 6. They do not. But, even if Arista’s
 25 mischaracterizations were correct, Arista cannot articulate any admissible legal theory that would
 26 connect Cisco’s sale of network management products to Arista’s admittedly “slavish” copying of
 27 Cisco’s copyrighted CLI so that Arista could sell its network devices to Cisco’s customers.

1 **III. ARISTA’S PLAN REVEALS THAT IT CAN TAKE THE DISCOVERY IT NEEDS**
 2 **WITHIN THE CURRENT TWENTY DEPOSITION LIMIT.**

3 As described above, Arista’s Plan consists of numerous unnecessary and cumulative
 4 depositions. While Arista has attempted to explain why these depositions seek relevant
 5 information (albeit with varying degrees of clarity and success), it has failed to explain why these
 6 depositions are necessary or important—as ordered by the Court (Jan. 28, 2016 CMC Tr. at 4:17-
 7 25) and required by Fed. R. Civ. P. 26.

8 In fact, Arista’s Plan reveals that Arista could easily complete the discovery it needs within
 9 the current twenty deposition limit, by pursuing a plan such as the one outlined below:

- 10 • CLI Creators (7). Five depositions already taken plus an additional CLI creator
and Mr. Remaker.
- 11 • Patent Inventors (3). Two depositions already taken plus Mr. Mustoe (to whom
12 Arista alleges the previously-deposed co-inventor Mr. Wheeler deferred on some
issues). *See* Plan at 3.
- 13 • Third Parties (4). Three depositions of third parties who are also alleged prior
14 artists (Avaya, Hewlett-Packard, and Juniper) plus Stanford University.
- 15 • Others (6). Arista could choose how to allocate these depositions, pursuing the
16 remaining subjects contained in its Plan and/or re-treading the subjects above.
Notably, within these six, Arista could cover competitive personnel, sales and
17 marketing personnel, and Cisco personnel knowledgeable regarding Tail-f and
Network Compliance Manager, incorporating every category in Arista’s Plan.

18 The Court already has *doubled* the normal deposition limit to permit Arista to take
 19 additional discovery. That expanded number of depositions is more than adequate for the topics
 20 identified by Arista. There is no need to provide four times the normal number of depositions.

21 **IV. CONCLUSION**

22 For the foregoing reasons, Cisco respectfully requests that the Court deny Arista’s request
 23 to raise the deposition limit to forty depositions per side in this case.²

24
 25
 26 ² Alternatively, if the Court grants Arista additional depositions, Cisco respectfully requests
 27 that it be awarded a corresponding increase, as the Court has previously indicated it would order.
 28 *See* Jan. 28, 2016 CMC Tr. at 8:4-6.

1 DATED: February 16, 2016

Respectfully submitted,

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